2009

State of Utah v. Wolfogango Ruiz : Reply Brief

Utah Court of Appeals

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Case No. 20090559

IN THE

UTAH SUPREME COURT

State of Utah,
Plaintiff/Petitioner,

vs.

Wolfgango Ruiz,
Defendant/Respondent.

Reply Brief of Petitioner

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The following points are submitted in response to arguments raised in Defendant Ruiz's brief. For those matters not expressly addressed, the State relies on the arguments made in its opening brief.

Reply to Defendant's Point I.A.

KENTUCKY V. PADILLA DOES NOT MOOT THE ISSUES RAISED ON CERTIORARI

After the State filed its opening brief, the United States Supreme Court issued *Kentucky v. Padilla*, 130 S.Ct. 1473 (2010). That decision placed an affirmative duty on defense counsel to accurately advise a noncitizen client of the deportation consequences of a guilty plea, when those consequences are "truly clear" under immigration law. *Id.* at 1483. Ruiz argues that *Padilla* renders the questions on certiorari moot. Br. Aple. 15-20. Ruiz is incorrect.

"A case is deemed moot when the requested judicial relief cannot affect the rights of the litigants." *State v. Lane*, 2009 UT 35, ¶ 18, 212 P.3d 529 (internal quotation marks and citation omitted). Thus, an "appeal is moot if during the pendency of the appeal circumstances change so that the controversy is eliminated, thereby rendering the relief requested impossible or of no legal effect." *Id.* (internal quotation marks and citation omitted). "The burden of persuading the court that an issue is moot lies with the party asserting mootness." *Salt Lake County v. Holliday Water Co.*, 2010 UT 45, ¶ 21, 658 Utah Adv. Rep. 25 (internal quotation marks and citations omitted).

As explained below, *Padilla* does not eliminate the controversy raised by the State on certiorari, or otherwise render "the relief requested impossible or of no legal effect." *Lane*, 2009 UT 35, ¶ 18. It therefore does not render this appeal moot.

Before *Padilla*, Utah law—like the law in many jurisdictions—held that defense counsel had no affirmative duty to advise clients of the adverse deportation consequences of guilty pleas. *See State v. Rojas-Martinez*, 2005 UT 86, ¶ 20, 125 P.3d 930. *See also Padilla*, 130 S.Ct. at 1484 (and cases cited therein) and *id.* at 1491-92 (J. Alito, concurring in the judgment). The underlying rationale for the former rule was that deportation was a collateral consequence of a guilty plea and that counsel does not perform deficiently by failing to advise a client of a plea's collateral consequences. *See Rojas-Martinez*, 2005 UT 86, ¶ 20. But while criminal defense

counsel was not required to advise noncitizen clients of adverse deportation consequences, defense counsel performed deficiently if he affirmatively misrepresented those consequences. *Id.* at ¶¶ 20-21. In other words, before *Padilla*, defense counsel did not perform deficiently by remaining silent regarding the deportation consequences of a plea; but if counsel did not remain silent, his advice had to be correct. *See id.*

Padilla broadened defense counsel's duty by holding that competent counsel can no longer remain silent regarding the deportation consequences of a guilty plea, when those consequences are "truly clear" under immigration law. *Padilla*, 130 S.Ct. at 1483. Rather, when those consequences are "truly clear," defense counsel now has an affirmative duty to accurately advise a noncitizen client of those consequences. *Id.* However, when immigration law is not "succinct and straightforward," the duty is "more limited." *Id.* Then, "a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Id.*

But the analysis both pre- and post-*Padilla* does not end there. Whether a criminal defense counsel has accurately advised a noncitizen client on the deportation consequences of a guilty plea goes only to whether counsel performed deficiently under *Strickland v. Washington*, 466 U.S. 668 (1984). To prove ineffective assistance of counsel in this context, the noncitizen defendant must prove not only

that his counsel performed deficiently, but also that his counsel's silence or erroneous advice prejudiced him. *See Padilla*, 130 S.Ct. at 1486-87. As Ruiz concedes, to prove prejudice, the noncitizen defendant must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Br. Aple. 16 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

Relying on *Padilla*, Ruiz argues that he "easily meets both *Strickland* requirements." Br. Aple. 16. Ruiz reasons that *Padilla* therefore mandates reversal of Judge Skanchy's order, and, thereby renders the issues before this Court moot. *Id.* at 15-20. *Padilla*, however, neither answers the questions before this Court, nor eliminates the controversy between the parties.

The primary question on certiorari review is whether "the court of appeals erred in vacating the district court judge's reconsideration of a prior judge's decision, thereby reinstating the prior decision." Irrespective of *Padilla*, this Court must answer that question before it can be determined whether Ruiz is entitled to withdraw his guilty plea. If the court of appeals correctly held that Judge Skanchy abused his discretion in taking more evidence and reversing Judge Fuchs, Ruiz will be entitled to withdraw his guilty plea. *See State v. Ruiz*, 2009 UT App 121, ¶ 15, 210 P.3d 955. This is because Judge Fuchs's order allowing Ruiz to withdraw his plea would stand. *See id.*

But if—as the State contends—the court of appeals erred and Judge Skanchy did not abuse his discretion, *Padilla* does not mandate reversing Judge Skanchy's order not allowing Ruiz to withdraw his plea. *See* 251:36; R160-63. As stated, *Padilla* holds that counsel performs deficiently if counsel does not accurately advise his noncitizen client of "truly clear" adverse deportation consequences. *Padilla*, 130 S.Ct. at 1483. Under *Padilla*, counsel fails in this duty either by remaining silent or by affirmatively misadvising the client. *See id.* at 1483. Ruiz alleged below not that his counsel stood silent, but that his counsel affirmatively misadvised him. R56, 59-65, 70-73. Ruiz's affidavit in support of his motion to withdraw his plea claimed that his counsel told him that he would not be deported. R70. Plea counsel agreed that he did not remain silent, but disputed that his deportation advice was erroneous. *See* R116-17. Plea counsel testified that he repeatedly told Ruiz that he would "almost certainly be deported." R251:20-22. Ruiz has not shown that this advice was incorrect under "truly clear" immigration law. *See Padilla*, 130 S.Ct. at 1483.

Thus, whether Ruiz's counsel performed deficiently depends not on *Padilla*, but on whom the trial court believed. Here, Judge Skanchy credited counsel's testimony over Ruiz's affidavit to find that counsel did not misadvise Ruiz on the deportation consequences of his plea. So long as that finding is undisturbed, *Padilla* does not mandate reversing Judge Skanchy's order.

In any event, it is not clear that *Padilla* would apply to Ruiz. Counsel's performance is judged at the time of the alleged error and based on his or her "perspective at the time." *Wiggins v. Smith*, 539 U.S. 510, 523 (2003). *See also State v. Dunn*, 850 P.2d 1201, 1228 (Utah 1993). At the time Ruiz entered his plea, the law in Utah and elsewhere was that counsel had no duty to advise a noncitizen client of the immigration consequences of a plea; counsel's only duty in that regard was to not affirmatively misadvise. *See Rojas-Martinez*, 2005 UT 86, ¶ 20.

Also, *Padilla* by its express terms applies only to advice regarding the adverse *deportation* or *removal* consequences of a plea. *See Padilla*, 130 S.Ct. at 1480-84. In this case, Ruiz seems to suggest that his counsel's alleged misadvice related not to the deportation consequences of his plea, but to its adverse affect on his ability to adjust his status "to lawful permanent resident alien." Br. Aple. 18-19.

Finally, *Padilla* involved a *legal* alien. *Padilla*, 130 S.Ct. at 1477. An *illegal* alien can hardly show prejudice where his illegal status constitutes an independent basis for deportation. Ruiz asserts in his brief that he "legally *entered* the United States." Br. Aple. 6. To support this claim, he attaches extra-record immigration documents in his Addendums G and H. Because this Court's review "is limited to only those materials contained in the record," it must disregard those documents. *Tillman v. State*, 2005 UT 56, n.5, 128 P.3d 1123. *See also State v. Johnson*, 2007 UT App 184, ¶ 39, 163 P.3d 695. But even if Ruiz entered this country legally, he does not deny or

dispute that he *remained* here illegally or that he told his counsel that he was in this country illegally at the time he pled guilty. *See* R251:20-21. Nor does he explain how his counsel's advice that his plea would "almost certainly" result in deportation was either incorrect or prejudiced him under *Padilla.* If Ruiz was willing to plead guilty believing that he would "almost certainly" be deported based on his plea, he cannot show that if his counsel had told him otherwise that he would not have pled guilty. *See Hill*, 474 U.S. at 59.

In sum, *Padilla* does not render the questions before this Court moot.

Reply to Defendant's Point I.B

A TRIAL COURT'S FAILURE TO MAKE FINDINGS OR ARTICULATE REASONS SHOULD NOT RESULT IN AUTOMATIC REVERSAL

Ruiz agrees that "a trial judge's failure to make findings or articulate reasons does not ordinarily warrant automatic reversal.'" Br. Aplt. 20 (quoting State's Brf. 17 and citing *Valcarce v. Fitzgerald*, 961 P.2d 305, 316 (Utah 1998) and *State v. Pecht*, 2002 UT 41, ¶ 34, 48 P.3d 931) (emphasis omitted). Ruiz disagrees, however, that the court of appeals held this. Br. Aple. 21, 26. Ruiz contends that the court of appeals reversed, not because Judge Skanchy did not articulate his findings, but because the record as a whole did not support his findings. Br. Aplt. 21, 26.

Ruiz misreads the court of appeals' opinion, which clearly reversed solely because Judge Skanchy did not articulate his reasons for hearing Mr. Otto's

testimony. *See Ruiz*, 2009 UT App 121, ¶ 14. After correctly stating the general rule—that "trial judges generally are not required to give reasons for discretionary rulings"—the court of appeals stated that "[w]hen a second judge announces a reversal of a prior judge's order, it is doubly important for the second judge to articulate a reason for the change." *Id.* The court of appeals then noted that "Judge Skanchy did not articulate why he was allowing the State to present new evidence, after the State had been given multiple opportunities to present such evidence and after Judge Fuchs had rebuffed the State's request for yet a further opportunity to do so."[1] *Id.* After reiterating that "it was especially incumbent on Judge Skanchy to explain why a change was in order," the court of appeals concluded its analysis with, "Absent such an explanation on the record, we have no assurance that the change was not merely a function of personal preference on Judge Skanchy's part." *Id.* Other than noting that pre-sentence motions to withdraw a plea should be "liberally granted," the foregoing was the sum total of the court of appeals' analysis. *Id.* at ¶¶ 11-14.

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[1] As noted in the State's opening brief, this statement is incorrect. In fact, the prosecutor had been given only one prior opportunity to present evidence—at the hearing on the motion to withdraw the plea held by Judge Fuchs. *See* State's Brf., 2-7, 8 n.5. Moreover, while Judge Fuchs "rebuffed" the prosecutor's initial attempt to continue the hearing to call plea counsel to testify, Judge Fuchs did not "rebuff" the prosecutor's later motion to reconsider and take counsel's testimony. Rather, over Ruiz's written objection, Judge Fuchs set the matter for hearing. R122-28, 136, 137-42, 144, 161.

The foregoing statements lead inexorably to the conclusion that the court of appeals reversed Judge Skanchy—not because his decision was incorrect or an abuse of discretion—but merely because he did not explain "on the record" why he was allowing the State to put on additional evidence. *See id.* at ¶ 14.

Ruiz nevertheless suggests that the court of appeals properly reversed because the record did not "patently" support Judge Skanchy's decision to allow the State to put on plea counsel Otto's testimony. Br. Aple. 21-26. In so arguing, Ruiz agrees that under this Court's precedent, a judge's discretionary ruling should not be reversed for a failure to articulate supporting reasons on the record, where those reasons are apparent on the face of the record. *See id.*; *see also* State's Brf. 22-25 (and cases cited therein).

Ruiz, however, fails to recognize that before reversing, the court of appeals never looked to the record to see if it supported Judge Skanchy's decision to take Otto's testimony. Rather, the court of appeals based its reversal solely on Judge Skanchy's failure to state his supporting reasons for the evidentiary hearing on the record. *See Ruiz*, 2009 UT App 121, ¶¶ 11-14. Moreover, as explained in the State's opening brief, the record here clearly supports Judge Skanchy's decision, where (1) Judge Fuchs had already set the matter for hearing over Ruiz's objection, and (2) Mr. Otto's affidavit, if true, suggested that a fraud had been committed on the trial court. *See* State's Brf., 25-29.

Ruiz also fails to acknowledge the State's cited authority that even when the record does not patently support a trial court's discretionary ruling, the remedy is not outright reversal, but a remand to allow the trial court to put its reasons on the record. *See* State's Brf. 24-25, 29-30 (citing *Neerings v. Utah State Bar*, 817 P.2d 320, 323 (Utah 1991); *Bell v. Bell*, 810 P.2d 489, 493-94 (Utah App. 1991); and *City of Phoenix v. Geyler*, 697 P.2d 1073, 1080 (Ariz. 1985)). Thus, rather than reversing Judge Skanchy for failing to put his reasons for the evidentiary hearing on the record, the court of appeals should have remanded to allow him to complete his findings.

In sum, given that Judge Skanchy's reasons for holding the evidentiary hearing were apparent on the face of the record, the court of appeals should have affirmed. But even if those reasons were not apparent on the face of the record, the remedy is not to simply reverse as suggested by Ruiz. *See* Br. Aple. 20-26. Rather, it is to remand for the trial court to state its reasons on the record and complete its findings. *See Neerings*, 817 P.2d at 323 (failure to state grounds for decision not reversible error; rather "in an appropriate case, failure to do so may only justify remand to the trial court").

Reply to Defendant's Point II.B

JUDGE SKANCHY DID NOT ABUSE HIS DISCRETION IN TAKING COUNSEL'S TESTIMONY AND RECONSIDERING THE MOTION TO WITHDRAW IN LIGHT OF THAT TESTIMONY

Ruiz presents three reasons why the court of appeals properly held Judge Skanchy abused his discretion in re-opening the evidence and reconsidering his motion to withdraw in light of that evidence. Br. Aple. 33-40. The court of appeals, however, relied on none of these reasons. To the extent that Ruiz presents these reasons as an alternative basis for affirming the court of appeals, they are unpersuasive.

A. Judge Skanchy had discretion to re-open the evidence and reconsider the motion to withdraw in light of that evidence.

Ruiz first argues that Judge Skanchy "erred in entertaining a motion to reconsider when Utah law specifically frowns against such a procedural motion." Br. Aple. 33 (citing *Gillett v. Price*, 2006 UT 24, 135 P.3d 861). He then asserts that if anything, the State's motion is more properly construed as a motion under rule 60(b), Utah Rules of Civil Procedure, to set aside the judgment on the basis of fraud. *Id.* He thus reasons that Judge Skanchy could not properly consider the State's motion absent proof that Ruiz perpetrated a fraud on the court. *Id.*

Ruiz misapprehends Utah law on this point. Like most motions, motions to reconsider are not expressly "recognized" in the Utah Rules of Civil Procedure.

Tschaggeny v. Milbank Ins. Co., 2007 UT 37, ¶ 15, 163 P.3d 615. Nevertheless, "motions to or decisions by the district court to reconsider or revise *nonfinal* judgments, . . . are *sanctioned* by our rules." *Gillett*, 2006 UT 24, ¶ 10 (emphasis added). Although Ruiz argues otherwise, Judge Fuchs's order allowing him to withdraw his guilty plea was a nonfinal order. In criminal cases, "it is the sentence itself which constitutes a final judgment." *State v. Gerrard*, 584 P.2d 885, 886 (Utah 1978). Once Ruiz was allowed to withdraw his guilty plea, the prosecution began anew as if the plea had never happened. *See, e.g., State v. Powell*, 957 P.2d 595, 596-97 (Utah 1998); *see also State v. Maguire*, 1999 UT App 45, ¶ 11, 975 P.2d 476 (by withdrawing guilty plea, defendant "by his own hand, defeated his expectation of finality"). Moreover, because a final judgment had not yet been entered, Judge Fuchs was free to revisit his order at any time. *Cf. State v. Lopez*, 2005 UT App 496, ¶¶ 20-23, 128 P.3d 1 (holding that trial court could reverse its decision to accept guilty plea up until it signed and entered final judgment). And here, Judge Fuchs had begun reconsideration when he set the matter for further hearing before he retired.

Ruiz is also mistaken that the prosecution's motion is more properly viewed as a rule 60(b) motion, although the prosecutor did style his motion as such. *See* R105-113. Rule 60(b), by its terms, generally applies to final judgments and not to a request to reconsider an interim, nonfinal order. Utah R. Civ. P. 60(b) (a "court may

in the furtherance of justice relieve a party or his legal representative from a *final* judgment, order, or proceeding . . .") (emphasis added). *See also* Utah R. Civ. P. 55(b) (providing that trial court may set aside nonfinal entry of default for "good cause shown," but that if *judgment* by default has been entered, rule 60(b) applies). As stated, Judge Fuchs's order allowing Ruiz to withdraw his plea was not a final judgment or order. But more to the point, the motion itself asked for nothing more than that Judge Fuchs reconsider his initial refusal to re-open the evidence and hear Otto's testimony and then reconsider his order allowing Ruiz to withdraw his plea in light of Otto's affidavit and anticipated testimony. *See* R105-113. Thus, the State's motion was truly a motion to reconsider a nonfinal order, which, as explained, is both allowed and sanctioned by our rules. *See Gillett*, 2006 UT 24, ¶ 10.

Additionally, contrary to Ruiz's contention, the prosecution was not required to prove fraud before either Judge Fuchs or Judge Skanchy could reconsider that nonfinal order. As explained in the State's opening brief, a judge is free to reconsider a nonfinal order at any time before final judgment for a variety of reasons, which may or may not include fraud. *See* State's Brf. 18-21. Of course, as also explained in the State's opening brief, Otto's affidavit, while not conclusive proof, raised the specter that a fraud had been committed on the court and thereby justified re-opening the evidence to inquire into the matter. State's Brf. 26-29.

B. The prosecutor's personal problems are irrelevant to whether Judge Skanchy abused his discretion.

Ruiz contends that Judge Skanchy abused his discretion by failing to take into account that the prosecutor's negligence might have been attributable to the prosecutor's "potential or alleged cocaine problem." Br. Aple. 37-38. As Ruiz did in both the trial court and the court of appeals, he asserts that long after Judge Skanchy entered his order vacating the withdrawal of the guilty plea, but before Ruiz's sentencing, the prosecutor in this case was charged with possession of cocaine. *Id.*

Judge Skanchy properly recognized that Ruiz failed to establish a causal connection between the prosecutor's alleged cocaine possession and the trial court's ruling on the motion to consider. R252:5-7. Moreover, other than Ruiz's unsupported allegations in his motion to arrest judgment, there is nothing in the record concerning the prosecutor's alleged arrest or cocaine use. *See* R201-19. Consequently, Ruiz's brief contains no record citations to support this claim. *See* Br. Aple. 37-38. Ruiz instead relies solely on a citation to a newspaper article and his own unsupported allegations. *See id.* at 38 n.23. As discussed, this Court may consider only those matters appearing the record. *See Tillman*, 2005 UT 56 n.5; *Johnson*, 2007 UT App 184, ¶ 39. But, in any event, even assuming that the prosecutor was arrested for and charged with cocaine possession, Judge Skanchy correctly concluded that fact had no bearing on the validity of Ruiz's plea or on the

correctness of any of the court's prior rulings. Undoubtedly, this was the reason that the court of appeals did not rely on this ground to reverse Judge Skanchy.

C. The record does not support Ruiz's claim that the prosecutor engaged in forum shopping.

Ruiz argues that granting the motion to reconsider violated due process and gave the State an unfair advantage over him by allowing the prosecutor to forum shop and re-litigate. Br. Aple. 38-39.

The record does not support Ruiz's forum-shopping claim. The prosecutor did not file his motion to reconsider with another judge. He filed the motion with Judge Fuchs, the same judge who issued the ruling he wanted revisited. R99; R105. Nothing in the record suggests that the prosecutor delayed filing the motion for the purpose of having another judge hear it. Indeed, the prosecutor filed the motion only 9 days after the trial court entered the order granting the motion to withdraw. R99, 105. Nor does anything in the record suggest that the prosecutor knew that Judge Fuchs would retire before deciding the motion. To the contrary, the prosecutor sought and obtained a hearing date on the motion from Judge Fuchs. R105, 113, 136. Although the prosecutor asked Judge Fuchs for a continuance based on a scheduling conflict, the record contains no evidence that the continuance was sought for the purpose of getting the matter before a different judge. R137. In short,

Ruiz cites no record evidence that supports his assertion that the prosecutor engaged in forum shopping.[2]

Ruiz cites *State v. Redd*, 2001 UT 113, 37 P.3d 1160, to support his claim that his due process rights were violated by allowing the prosecutor to re-litigate the motion to withdraw. Br. Aple. 39-40. *Redd*, which belongs to the *Brickey* line of cases, is inapposite. *Brickey* held that "due process considerations prohibit a prosecutor from refiling criminal charges earlier dismissed for insufficient evidence unless the prosecutor can show that new or previously unavailable evidence has surfaced or that other good cause justifies refiling." *State v. Brickey*, 714 P.2d 644, 647 (Utah 1986). *See also Redd*, 2001 UT 113, ¶ 13.

But the "*Brickey* rule is a narrow one," and "only 'limits a prosecutor's ability to *refile a previously dismissed charge*.'" *State v. Zahn*, 2008 UT App 56, ¶ 5, 180 P.3d

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[2] Ruiz gives two record cites—R.252, at 5-6, and R. 203-219—as support for his assertion that "the State knew full well in advance that Judge Fuchs was preparing to retire when they filed the 'motion to reconsider' and that the case would be re-assigned to another judge." Br. Aple. 40. Those citations are only to Ruiz's unsupported allegations below that the prosecutor forum shopped. Neither citation establishes nor supports that the prosecutor in fact did. The first cite is to counsel's unsupported assertion at sentencing that the prosecution filed its motion to re-open after Judge Fuchs retired. R252:5-6. But, in fact, the prosecution filed its motion before Judge Fuchs retired and Judge Fuchs set it for hearing after Ruiz responded. *See* R105, 119, 122, 136. The second cite is to Ruiz's memorandum in support of his motion to arrest judgment. That memo cited no evidence that the prosecutor knew before filing the motion to reconsider that Judge Fuchs would retire before hearing the motion.

186 (quoting *State v. Rogers*, 2006 UT 85, ¶ 9, 151 P.3d 171) (emphasis added in *Zahn*). Here, no charge has been dismissed or refiled. Rather, the trial court merely granted the State's single motion to reconsider a ruling that allowed Ruiz to withdraw his plea.

Allowing the prosecution to later present Mr. Otto's testimony—even though Judge Fuchs had originally refused to—does not violate due process or work any unfairness on Ruiz. Due process does not insulate a ruling obtained by factual misrepresentations from further review when those misrepresentations come to light. Due process guarantees only that a defendant will be subjected to a fair process. There is nothing unfair in a process that allows a court to correct a ruling originally based on a defendant's factual misrepresentations. Indeed, such a process is inherently fair. *Cf. Gildea v. Guardian Title Co.*, 2001 UT 75, ¶ 9, 31 P.3d 543 (law of the case doctrine should not be applied so as "to promote efficiency at the expense of the greater interest in preventing unjust results or unwise precedent").

In sum, as explained above and in the State's opening brief, Judge Skanchy did not abuse his discretion in taking Otto's testimony and revisiting the motion to withdraw in light of that testimony. It is true that the prosecutor here was clearly derelict in his duty to timely present Otto's testimony. Both Judge Fuchs and Judge Skanchy, therefore, would have been well within their discretion to refuse to re-open the evidence and reconsider the motion to withdraw. But faced with

subsequent allegations that Ruiz had fraudulently obtained the prior order to withdraw, they were also well within their discretion to overlook the prosecutor's negligence in favor of ascertaining the truth. *See Medel v. State*, 2008 UT 32, ¶ 54, 184 P.3d 1126 ("The justice system is not a sporting event in which each side has a right to exploit every tactical advantage available."); *State v. Howell*, 649 P.2d 91, 94 (Utah 1982) (recognizing that criminal trial process is more than "a game" and that its "primary purpose . . . is the vindication of the laws of a civilized society against those who are guilty of transgressing those laws"). Given the concerns raised by plea counsel's affidavit and the trial court's interest in ensuring that no fraud had been perpetrated, the court of appeals erred in finding any abuse of discretion in inquiring into the matter.

Reply to Defendant's Point III

PADILLA DOES NOT REQUIRE THAT PRE-SENTENCE MOTIONS TO WITHDRAW A GUILTY PLEA BE "LIBERALLY GRANTED"

Ruiz disagrees with the State's analysis in its opening brief on why the "liberally granted" language appearing in prior Utah cases has been superseded by statute. *See* Br. Aple. 40-41, and 26-30. The State's opening brief adequately addresses Ruiz's arguments on this point, except as to his claim that *Padilla* "calls on the lower courts to be flexible in adjudicating motions to withdraw pleas by non-

citizen defendants and predicated on [ineffective assistance" ground[s]." Br. Aple. 50, 44-46, 48.

The majority opinion in *Padilla* contains no such call. Rather, the language Ruiz cites to is found in Justice Alito's concurring opinion. *See* Br. Aple. 27-28, 44, 48; *Padilla*, 130 S.Ct. at 1491 (Alito, J., concurring in the judgment). Ruiz overreads Justice Alito's comments, which were made in roundly criticizing the majority's adoption of a "rigid constitutional rule." *Padilla*, at 1491 (Alito, J., concurring in the judgment). Justice Alito, who would have instead adopted the rule in *Rojas-Martinez*, argued that the majority's new broad rule "could inadvertently head off more promising ways of addressing the underlying problem – such as statutory or administrative reforms requiring trial judges to inform a defendant on the record that a guilty plea may carry adverse immigration consequences." *Id.* Justice Alito further noted that such "flexible statutory procedures for withdrawing guilty pleas might give courts appropriate discretion to determine whether the interests of justice would be served by allowing a particular defendant to withdraw a plea entered into on the basis of incomplete information." *Id.*

In other words, neither the *Padilla* majority nor Justice Alito called upon courts to adopt more "flexible" procedures for withdrawing guilty pleas. Rather, Justice Alito faulted the majority for adopting a rule that might discourage states from adopting more flexible statutory or administrative procedures.

But regardless of whether a state statute should be more flexible in allowing a defendant to withdraw a guilty plea, as explained in the State's opening brief, Utah's statute is clear. A defendant may withdraw a guilty plea only upon "a showing that it was not knowingly and voluntarily made." Utah Code Ann. § 77-13-6(2). "Liberality" plays no part in Utah's statutory analysis. The court of appeals erred in holding otherwise.

CONCLUSION

This Court should reverse the court of appeals.

Respectfully submitted August 12th 2010.

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CERTIFICATE OF SERVICE

I certify that on August 13, 2010, two copies of the foregoing reply brief were

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A digital copy of the reply brief was also included: ☑ Yes ☐ No

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